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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10 (HON. LOUISA S. PORTER)

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 GABINO PALAFOX,

15 Defendant.
16
17
18

Criminal No. 05cr2852-JAH

19 **MEMORANDUM OF POINTS
20 AND AUTHORITIES IN SUPPORT
21 OF DEFENDANT'S MOTIONS
22 TO:**

- 23 1) **COMPEL DISCOVERY; and**
24 2) **FOR LEAVE TO FILE**
25 **FURTHER MOTIONS**

26 **I.**

27 **STATEMENT OF FACTS**

28 Without admitting to the facts as set forth herein, the Government alleges that Gabino Palafox conspired together and with others to commit an offense against the United States, to wit: to introduce into interstate commerce a device that is adulterated in that it lacks approval for marketing from the Food and Drug Administration, in violation of Title 21, United States Code, Sections 331(a), 351(f), and 333(a)(1).

It is alleged that between on or about October 15, 2002, and continuing through on or about March 16, 2005, within the Southern District of California, Gabino Palafox

1 introduced into interstate commerce a device, to wit, the Energy Wellness machine, that is
2 adulterated in that it lacks approval for marketing from the Food and Drug
3 Administration, a misdemeanor, in violation of Title 21, United States Code, Sections
4 331(a), 351(f), and 333(a)(1).

5 **II.**

6 **MOTION TO COMPEL FURTHER DISCOVERY**

7 (1) The Defendant's Statements. Under Fed. R. Crim. P. 16 (a)(1)(A), the
8 defendant is entitled to the disclosure of all copies of any written or recorded statements
9 made by the defendant; the substance of any statements made by the defendant which the
10 Government intends to offer in evidence at trial; any response by the defendant to
11 interrogation; the substance of any oral statements which the Government intends to
12 introduce at trial, and any written summaries of the defendant's oral statements contained
13 in the handwritten notes of the government agent; any response to any Miranda warnings
14 which may have been given to the defendant (see United States v. McElroy, 697 F. 2d
15 459 (2d Cir. 1982)); and any other statements by the defendant that are discoverable
16 under Fed. R. Crim. P. 16(a)(1)(A). The Advisory Committee Notes, as well as the 1991
17 amendments to Rule 16, make it clear that the Government must reveal all of the
18 defendant's statements, whether oral or written, regardless of whether the Government
19 intends to introduce those statements.

20 (2) Arrest Reports, Notes, and Audio and/or Video Tapes. Mr. Palafox also
21 specifically requests that all arrest reports, notes, and all audio and/or video tapes that
22 relate to the circumstances surrounding his arrest or any questioning, if such reports,
23 notes, records, reports, transcripts, or other documents in which statements of the
24 defendant or any other discoverable material is contained. This is all discoverable under
25 Fed. Rule. Crim. P. 16(a)(1)(A) and Brady v. Maryland, 373 U.S. 83 (1963). (See also
26 United States v. Johnson, 525 F. 2d 911 (9th Cir. 1968).) Arrest reports, investigator's
27 notes, memos from arresting officers, dispatch tapes, sworn statements, and prosecution
28 reports pertaining to the defendant are available under Fed. R. Crim. P. 16(a)(1)(B) and

1 (C), Fed. R. Crim. P. 26.2 and 12(I).

2 (3) Reports of Tests and/or Examinations. Pursuant to Fed. R. Crim. P. 169(D),
3 Mr. Palafox requests the reports of all tests and examinations conducted upon the
4 evidence in this case, including, but not limited to, any fingerprint testing done upon
5 any evidence obtained in this case that is within the possession, custody, or control of the
6 Government, the existence of which is known, or by the exercise of due diligence may
7 become known, to the attorney for the Government, and which are material to the
8 preparation of the defense or which are intended for use by the Government as evidence
9 in chief at the trial. Mr. Palafox also requests copies of any reports of physical and
10 mental examinations which are material to the defense or intended for use by the
11 Government as evidence at the trial. (Fed. R. Crim. P. 16(a)(1)(D).)

12 (4) Brady Material. Mr. Palafox requests all documents, statements, agents'
13 reports, and tangible evidence favorable to the defendant on the issue of guilt and/or
14 which affects the credibility of the Government's case. Impeachment, as well as
15 exculpatory evidence, falls within Brady's definition of evidence favorable to the
16 accused. (United States v. Bagley, 473 U.S. 667 (1985).) This request specifically
17 includes any information about out-of-court identifications of Mr. Palafox by percipient
18 witnesses to any transactions.

19 (5) Evidence Seized. Mr. Palafox requests that all surveillance and any other
20 relevant tapes, photographs, or any other physical evidence that may be destroyed, lost,
21 or otherwise put out of the possession, custody, or care of the Government and which
22 relate to the arrest or the events leading to the arrest in this case be preserved. This
23 request specifically includes, but is not limited to, any and all audio tapes of monitored
24 telephonic communications, and any evidence seized from any third party. It is requested
25 that the Government be ordered to question all of the agencies and individuals involved in
26 the prosecution and investigation of this case to determine if such evidence exists and, if
27 it does exist, to inform those parties to preserve any such evidence. Specifically, the
28 defense requests the preservation and opportunity to inspect and copy all physical

1 evidence that is allegedly involved in this case.

2 (7) Tangible Objects. Mr. Palafox requests, under Fed. R. Crim. P. 16(a)(2)(c),
3 the opportunity to inspect and copy, as well as test, if necessary, all other documents and
4 tangible objects, including photographs, books, papers, documents, photographs of
5 buildings or places, or copies of portions thereof, which are material to the defense or
6 intended for use in the Government's case-in-chief, or were obtained from or belong to
7 the defendant.

8 (8) Evidence of Bias or Motive to Lie. Mr. Palafox requests any evidence that
9 any prospective Government witness is biased or prejudiced against the defendant, or has
10 a motive to falsify or distort his or her testimony. This request specifically includes, but
11 is not limited to, any evidence that the percipient informant-witnesses are biased against
12 the defendant, or has a motive to falsify or distort their testimony. (Pennsylvania v.
13 Ritchie, 480 U.S. 39 (1987); United States v. Strifler, 851 F. 2d 1197 (9th Cir. 1988).)

14 (9) Impeachment Evidence. Mr. Palafox requests any evidence that any
15 prospective Government witness has engaged in any criminal act, whether or not resulting
16 in a conviction, and whether any witness has made a statement favorable to the defendant.
17 See Fed. R. Evid. 608, 609, and 613. Such evidence is discoverable under Brady v.
18 Maryland, supra. (See United States v. Strifler, 851 F. 2d 1197 (9th Cir. 1988) (witness'
19 prior record); and Thomas v. United States, 343 F. 2d 49 (9th Cir. 1965) (evidence that
20 detracts from a witness' credibility).)

21 (10) Evidence of Criminal Investigation of Any Government Witness.
22 Mr. Palafox requests any evidence that any prospective witness is under investigation by
23 federal, state, or local authorities for any criminal conduct. (See United States v. Chitty,
24 760 F. 2d 425 (2d Cir.) Cert. denied, 474 U.S. 945 (1985).)

25 (11) Evidence Affecting Perception, Recollection, Ability to Communicate, or
26 Truth Telling. The defense requests any evidence, including any medical or psychiatric
27 report or evaluation, tending to show that any prospective witness' ability to perceive,
28 remember, communicate, or tell the truth is impaired; and any evidence that a witness has

1 ever used narcotics or other controlled substance, or has ever been an alcoholic. (United
2 States v. Strifler, 851 F. 2d 1197 (9th Cir. 1988); Chavis v. North Carolina, 637 F. 2d 213,
3 224 (4th Cir. 1980).)

4 (12) Name of Witnesses Favorable to the Defendant. Mr. Palafox requests the
5 name of any witness who made an arguably favorable statement concerning the
6 defendant. (Jackson v. Wainright, 390 F. 2d 288 (5th Cir. 1968); Chavis v. North
7 Carolina, 637 F. 2d 213, 223 (4th Cir. 1980); Jones v. Jago, 575 F. 2d 1164, 1168 (6th
8 Cir.), cert denied, 439 U.S. 883 (1978); Hudson v. Blackburn, 601 F. 2d 785 (5th Cir.
9 1979), cert denied, 444 U.S. 1086 (1980).)

10 (13) Statements Relevant to the Defense. Mr. Palafox requests disclosure of any
11 statement that may be "relevant to any possible defense or contention" that he might
12 assert. (United States v. Bailleaux, 685 F. 2d 1105 (9th Cir. 1982).)

13 (14) Jencks Act Material. The defense requests all material to which defendant
14 is entitled pursuant to the Jencks Act, 18 U.S.C. § 3500, and Fed. R. Crim. P. 26.2.
15 These materials are producible after a witness testifies at a pretrial motion to suppress,
16 Fed R. Crim. P. 12(I), and after a witness testifies at trial. (18 U.S.C. § 3500.) Mr.
17 Palafox specifically requests pretrial production of these statements so that the court may
18 avoid unnecessary recesses and delays for defense counsel to properly use and Jencks
19 statements and prepare for cross-examination. A verbal acknowledgment that "rough"
20 notes constitute an accurate account of the witness' interview is sufficient for the report or
21 notes to qualify as a statement under 18 U.S.C. § 3500(e)(1). (Campbell v. United
22 States, 373 U.S. 487, 490-92 (1963).) In United States v. Boshell, 952 F. 2d 1101 (9th
23 Cir. 1991), the Ninth Circuit held that when an agent goes over interview notes with the
24 subject of the interview the notes are then subject to the Jencks Act.

25 (15) Giglio Information. Pursuant to Giglio v. United States, 405 U.S. 150
26 (1972), Mr. Palafox requests all statements and/or promises, express or implied, made to
27 any government witnesses, in exchange for their testimony in this case, and all other
28 information which could arguably be used for the impeachment of any government

1 witness.

2 (16) Grand Jury Transcripts. Transcripts of all testimony given before the Grand
3 Jury and those portions of Grand Jury minutes containing relevant testimony of persons
4 whom the Government intends to call as witnesses in an evidentiary hearing or trial in
5 the above-captioned case.

6 (17) Government Examination of Law Enforcement Personnel Files. Mr.
7 Palafox requests that the Government examine the personnel files and any other files
8 within its custody, care, or control, or which could be obtained by the Government, for all
9 testifying witnesses, including testifying officers and agents who may have been
10 controlling or contacting any confidential informant in this case. Mr. Palafox requests that
11 the Assistant U.S. Attorney assigned to this case ensure that a review is conducted of all
12 such files involved in the present case for evidence of perjurious conduct or other like
13 dishonesty, or any other material relevant to impeachment, or any information that is
14 exculpatory, pursuant to its duty under United States v. Henthorn, 931 F. 2d 29 (9th Cir.
15 1991).

16 (18) Expert Witnesses. Mr. Palafox requests the name, qualifications, and a
17 written summary of the testimony of any person that the Government intends to call as an
18 expert witness during its case-in-chief. (Fed. R. Crim. P. 16(a)(1)(E).)

19 (19) Any Information That May Result in a Lower Sentence. As discussed
20 above, this information is discoverable under Brady v. Maryland, 373 U.S. 83 (1963).
21 This request includes any cooperation or attempted cooperation by the defendant, as well
22 as any information that could affect any base offense level or specific offense
23 characteristic under Chapter Two of the Guidelines. Also included in this request is any
24 information relevant to a Chapter Three adjustment, a determination of the defendant's
25 criminal history, or any other application of the Guidelines.

26 (20) The Defendant's Prior Record. Evidence of prior record is available under
27 Fed. R. Crim. P. 16(a)(1)(B).

28 (21) Any Proposed 404(b) Evidence. Evidence of prior similar acts is

1 discoverable under Fed. R. Crim. P. 16(a)(1)(C) and Fed. R. Evid. 404(b) and 609. In
 2 addition, under Fed. R. Evid. 404(b), "upon request of the accused, the prosecution. . .
 3 shall provide reasonable notice in advance of trial. . . of the general nature . . ." of any
 4 evidence the government proposes to introduce under Fed. R. Evid. 404(b) at trial. The
 5 defendant requests that such notice be given three (3) weeks before trial in order to give
 6 the defense time to adequately investigate and prepare for trial.

7 (22) Residual Request. Mr. Palafox intends by this discovery motion to invoke
 8 his rights to discovery to the fullest extent possible under the Federal Rules of Criminal
 9 Procedure and the Constitution and laws of the United States. Mr. Palafox also requests
 10 that the Government provide him with the above material sufficiently in advance of trial
 11 so as to avoid unnecessary delay prior to cross examination.

12 III.

13 MR. PALAFOX REQUESTS LEAVE TO FILE FURTHER MOTIONS

14 As noted above, Mr. Palafox and defense counsel have received voluminous
 15 discovery in this case. As new information comes to light, however, due to Government
 16 providing discovery in response to these motions or an order of this Court, the defense
 17 may find it necessary to file further motions. It is therefore requested that defense
 18 counsel be allowed the opportunity to file further motions based upon information gained
 19 through the discovery process.

20 IV.

21 CONCLUSION

22 For the foregoing reasons, Mr. Palafox respectfully requests that this Court grant
 23 the above motions.

24 Dated: _____

Respectfully submitted,

25 s/Thomas J. Warwick, Jr.
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